Summary Judgment,
An Old Remedy Expansively Applied to Foil a Pleader's Hope

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Judge Charles Clark traces summary judgment procedures to 1921 when New York adopted its Civil Practices Act. "The Summary Judgment," 36 Minn. L. Rev 567 (1952). Judge Clark, who was on the Second Circuit, also admitted that the English system had a similar procedure in place about 70 years earlier. While initially limited, the English procedure was later expanded to allow summary judgments in most cases, except, interestingly, defamation and fraud, which were considered disfavored actions. Judge Clark also points out that the groundwork was laid for the vigorous use of summary judgments when it was ruled in the mid-1920s that a grant of summary judgment did not interfere with a right to a trial by jury. *See e.g., General Investment Co. V. Interborough Rapid Transit Co.,* 235 NY 133, 139 NE 216 (1923). The general rationale for the non-interference conclusion was that claims without defense or claims that were frivolous did not deserve a jury's time or attention.

Judge Clark also succinctly referenced the purpose of summary judgment rulings, to get down to brass tacks. "The touchstone thus [of a summary judgment motion] is the absence of a genuine issue as to a material fact.[The judge] takes the case as it actually is shown to be, not as the formal allegations of a pleading may have embodied a pleader's hope. " 36 Minn. L. Rev. at 571.

A respected Maine state jurist, Judge Donald Alexander, echoed Judge Clark's theme of efficiency in 1994 when he wrote that "Summary judgment practice can be a valuable aid to meeting public and client demands for a justice system that performs with less cost, complication and delay." "Summary Judgment: An Old Remedy for New Times," 9 Me. B.J. 292 (1994). In a footnoted suggestion that is appropriate to state courts and that may provide some insight into Judge Alexander's thinking, the judge listed the very limited resources available to the various state courts at the time and requested that judges be provided copies of important cases. Kennebec County, he noted, lacked a court library.

<u>Rule 56 Standards</u>

The standards for the grant of summary judgment are well rehearsed in many orders some of which we all lauded and others of which caused some of us great pain. It never hurts, however, to frequently review the rule in its entirety and with some care. The standards are important and we tend to mechanically cut and paste our favorite recitation of those standards without much thought. Read the

relevant local rule too. Local Rules on summary judgment differ from district to district. Maine, for example, requires the parties to attend a pre-filing conference or obtain a written waiver of same before a summary judgment motion may be filed. This local rule was in effect for all standard track cases, but now is in effect for all cases. New Hampshire has a local rule regarding motions to strike. They must be filed within fourteen days of the receipt of the material in question.

Here is how I think of the standards for summary judgment:

- Summary judgment may be sought as to claims and defenses;
- Summary judgment may be whole or partial;
- The party seeking summary judgment must establish an absence of genuine dispute about material facts;
- The party opposing summary judgment need not conclusively establish the merits of its claim or defense, but must only establish that it has a right to trial because there is a genuine issue about a material fact;
- A party opposing summary judgment may, but need not, file a cross-motion;
    - A judge may grant summary judgment against a movant even if a cross-motion is not filed;
    - A judge is not limited to the issues raised by the parties or the characterizations of the claims or defenses submitted by the parties;
- A denial of summary judgment is not appealable, except interlocutorily;
- The factual bases for and against summary judgment must consist of admissible evidence based on the personal knowledge of a competent witness;
    - The Rules of Evidence count;
    - Documents that are not self-authenticating must be authenticated;
- Summary judgment proof may be provided by experts in the form of affidavits or declarations under the pains and penalties of perjury (i.e., experts may swear to their reports);
    - The evidentiary rules concerning experts apply (e.g., Rule 703 and *Daubert*);

- Reasonable inferences may be drawn from the evidence filed by the parties, but don't stretch or rely heavily on inferences;
    - Spoliation creates inferences;
    - Assertions of the Fifth Amendment create inferences;
    - Assertions of privilege may cut off the ability to claim inferences.
- Courts may be asked to take judicial notice to support or oppose summary judgment;
- Parties should not be blindsided in a summary judgment proceeding;
    - For very good cause, a party may seek extended time to obtain additional affidavits or to conduct additional depositions.

Thinking about Summary Judgment

I consider summary judgment as I think about taking a case.[1] Summary judgment may end my client's case. Even if the case survives summary judgment, the litigation of a summary judgment motion is a cost that I must build into my budget for the matter I am undertaking. If I am not taking a case on a pro bono basis, I work hard at the outset to ensure my client's and my firm's financial expectations are aligned. The potential value of a case must justify its expense. Defending against complex summary judgment motions is a significant expense because it is exceedingly painstaking, time-consuming work. Even in the employment area where fee shifting statutes allow for the litigation of important matters that individual clients cannot fund, it is important to avoid becoming mired in summary judgment disputes needlessly because they eat up a lawyer's time. Worse yet, a lawyer will not be compensated by a fee order for work on portions of a summary judgment motion that are lost. The problem is further exacerbated if fees are a contingent percentage of the recovery. As a result, I think carefully about the kinds of claims that appear to draw summary judgment motions. I also think carefully about who I will likely see as opposing counsel because some counsel are more prone to a vigorous motion practice.

My initial client meetings are a series of contradictions. One of the more obvious ones is how I conduct them. In my mind, I use a structured interview format in which I know to ask about certain topics in specific ways. I have used this format since I was an intern in the Philadelphia Public Defender's Office. I was

[1] I have been asked to write this article from the perspective of a plaintiff's counsel even though my practice involves both the initiation and defense of employment claims and extends beyond employment law.

taught there never to ask a new client what was seized from him because the question was too technical and limiting. Instead, I was instructed to ask a client if anything was taken from him that was not returned. The difference is subtle, but the latter generally tended to provide more information about suppression issues because clients did not self-censor to meet the technical sounding nature of the former question. I try to think in this way when conducting initial client interviews in any practice area and I encourage our younger lawyers to think of the information they must learn about a claim or defense and to consider how best to ask open ended questions that may be narrowed depending upon the response.

The major contradiction in my conduct of initial client meetings is that I also know that clients must get things off their chests. They cannot focus on their stories if I constantly interrupt to ask a prescribed series of questions. As a result, after obtaining basic identifying information,[2] I ask an open-ended question appropriate to the client and the issues at hand that allows the client to talk. As the client talks, I listen. I listen and watch because, whether on summary judgment or at trial, the person speaking with me is likely my most important witness.

In considering whether I should accept the client, or whether a complex summary judgment motion is likely, I listen for the following (and if I don't hear what I need, I go back and ask questions to elicit more information and to clarify what I have heard):

- What happened?
    - Listen for information about membership in a protected class, but don't assume, ask about membership and explain why you are asking;
    - If harassment is alleged, ask by whom and about any reporting of the misconduct. Is there documentation?
    - Is there evidence of retaliation? Retaliation claims are often stronger because of shorter lapse of time and more difficulty explaining conduct at issue;
    - When did the conduct occur (or when did the client receive notice of the conduct)? What solid evidence is there of timing if there is likelihood of a statute of limitations challenge? Remember the brief statutes of limitations for most employment claims;
    - Does the client's description of events implicate a public policy? What is it? How do I prove it?
    - Are there unpaid wages involved that may form the basis of a more straightforward wage claim with the ability to lock in liquidated damages and fees?

[2] Conflicts are initially cleared before I see the client based on information collected by my assistant. I review her information and delve more deeply in the client meeting.

- Obvious Defenses
    - "Welcomeness;"
    - Stale or dated claims;
    - Factual challenges;
    - Absence of notice;
    - Failure to mitigate.

- History
    - Employment, education, litigation, medical, mental health;
    - What documentation is available and relevant? Don't forget RSA 275:56 right to personnel file. Obtain client authorizations;
    - Does the client journal, blog, Facebook, etc? Has the client shared information with close friends or relatives about the matters at issue? Is the client in therapy about these events?
    - Are there things I should research about the defendant's history?

- Damages
    - Wages;
    - Unusually rich benefits;
    - Retirement benefits;
    - Stock or options;
    - Mitigation or "replaceability of wages;"
    - Medical or mental health related.

- Align Expectations
    - What would you like to accomplish as a result of my representation?
    - Explain
        - elements,;
        - damages;
        - duty to mitigate;
        - costs, value of case;
        - complexities and uncertainties of litigation, timing;
    - Life is too short factor (i.e., is this worth the aggravation, expense and trouble?)

<u>Obtaining Proof to Support for Summary Judgment</u>

There are three kinds of facts that will be necessary for summary judgment: facts that are self-authenticated, facts that must be acquired from the defense or third parties, and facts that the client must create. The last category may sound the most controversial, but in practice is not. These "created" facts are those that result from the client's future conduct. The client must know to create these facts and must learn to document them. Two examples make the concept of created facts obvious.

If the client has not left her job and has yet to follow the employer's policy that requires notice of alleged harassment, the client must report her allegations to the proper person identified in the company's policy. For summary judgment purposes, the reported allegations must be in writing in clear and direct language. Documentation of the employer's receipt of the notice must be considered. Both the notice and the documentation of receipt are created facts.

Similarly, if the client has separated from her job, she probably has a duty to mitigate her damages. This requires instruction to the client explaining the duty and of the need to carefully document activities undertaken in mitigation. It is easier to create these facts as the client engages in mitigation then to re-create them after the fact.

Summary judgment facts must meet the requirements of the Rules of Evidence. Obtaining certified copies of official documents takes time. Plan for it. Submitting requests for admissions regarding authenticity takes more time because the underlying document must first be obtained and the opposing party must be sent requests for admissions.

Often pre-filing discovery involves the review of web pages or press statements or governmental filings. These images must be captured, saved and used in the discovery process. Some of the items acquired in pre-filing discovery are held back and not immediately made the subject of a request for admissions for strategic reasons. However, whether before or after strategic use of a print screen image of a web page at a deposition, at some point there must be consideration of how to authenticate that image for summary judgment purposes.

Acquired facts must be obtained from the defense or third parties. The full panoply of discovery devices should be considered understanding the efficacy and futility of each approach. Loosely worded interrogatories that inspire lawyerly answers, for example, are often of limited use. On the other hand fairly worded discovery requests deserve fair responses. Draft your complaint so that the relevance of information sought through discovery is clear. Remember discovery battles, like summary judgment disputes, are time sinks best avoided if unnecessary.

Somewhere between acquired facts and client created facts lies the area of expert reports that may be converted to summary judgment affidavits. Expert opinions may obviously be used to prove damages, but this is not their sole use at trial or in summary judgment. While meeting the standards of admissibility, expert reports may establish inferences that are relied upon to refute summary judgment and to establish issues of contested material facts. An expert may aver in an affidavit that a victim's sloughing off of offensive language is the result of a need to fit in or maintain a job at all costs and is not the result of welcoming the behavior at issue. To accomplish this task, the expert will require proof of the conduct and of the client's reaction and of the client's relevant life circumstances. These facts must be established through discovery or a client affidavit before the expert gets to work.

A client affidavit will no doubt become the subject of counter-discovery and should be drafted with this in mind. Similarly, to refute a defense claim that the client failed to mitigate her damages, the plaintiff's expert may aver to facts and inferences about the plaintiff's ability to gain new employment based on her age, education, job skills, and employment history

Two other points should be considered with respect to summary judgment discovery. First, the opposing party's refusal to cooperate in discovery may be helpful. A "no" may be as good as a "yes" when an opposing party claims a privilege to prevent disclosure of relevant information. The assertion of a privilege may foreclose the reliance upon inferences that would be helpful in disputing contested facts. It will be difficult for an employer to claim the benefit of a full throated investigation while also claiming the investigation is privileged.

Second, convenient affidavits that refute the earlier testimony of a witness that now proves damaging will often be rejected unless the witness has a very good reason for changing his position. Of course, all of this works in both directions. Your witnesses must be prepared to respond to difficult questions just as defense witnesses must answer the damning questions you ask.

Conclusion

> It is obvious that judges should be careful not to grant judgment against one who shows a genuine issue as to a material fact. Just as obvious is the obligation to examine a case with care to see that a trial is not forced upon a litigant by one with no case at all.

36 Minn. L. Rev. at 578.

Best of luck .